Nos. 20832, 20833 and 20834

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK ROBERSON and WILLIAM RODGERS,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Third-Party Plaintiff-
Appellant,

v.

MERRITT-CHAPMAN & SCOTT CORPORATION,
Third-Party Defendant-
Appellee.

MERRITT-CHAPMAN & SCOTT CORPORATION,
Third-Party Defendant-
Appellant,

v.

UNITED STATES OF AMERICA,
Third-Party Plaintiff-
Appellee.

ON APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES OF AMERICA

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JURISDICTIONAL STATEMENT

Appellants Jack Roberson and William Rodgers (plaintiffs)
enced this action against the United States under the
al Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, to
in damages for personal injuries sustained when they fell

from a scaffold while working at the Glen Canyon Dam in Page, Arizona (TR 1-8).[1/] The United States filed its answer to plaintiffs' complaint and a third-party complaint against their employer-Merritt-Chapman & Scott Corporation--demanding contractual indemnification for all sums which might be adjudged against it and in favor of plaintiffs (TR 9-11, 13-17). The United States moved for summary judgment against plaintiffs and, alternatively, to strike that portion of Merritt-Chapman & Scott's answer to its third-party complaint designated as "ADDITIONAL DEFENSES" (TR 18-22). The district court denied the motion for summary judgment and granted the motion to strike (TR 74). At the close of the plaintiffs' evidence, the United States moved for judgment in its favor. The district court granted that motion and dismissed plaintiffs' complaint and action on the merits and the United States' third-party complaint and action (TR 57, 74). Plaintiffs have appealed from the dismissal of their complaint and action (TR 58), and Merritt-Chapman & Scott has appealed from the failure of the district court to hold that it could not be liable to the Government for any portion of any judgment in favor of plaintiffs

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1/ "TR" refers to Volume I of the Transcript of Record on these appeals. "TP" refers to the district court reporter's transcript of proceedings.

and against the Government, and the court's order granting the Government's motion to strike its affirmative defenses (TR 66).[2] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1291. By agreement between the parties and with the Court's consent, these appeals have been consolidated for purposes of briefing and oral argument.

COUNTERSTATEMENT OF THE CASE

1. The Underlying Facts.

In April 1957, the United States Department of the Interior's Bureau of Reclamation awarded Merritt-Chapman & Scott, an independent contractor,[3] a contract for about $108,000,000, to construct and complete the Glen Canyon Dam, powerplant and appurtenant works on Government-owned land in Arizona and Utah (Defendant's Exhibit A).[4] The contract contained the following standard terms and conditions, among others (Defendant's Exhibit A):

> GENERAL PROVISIONS
> (CONSTRUCTION CONTRACTS)
>
> 8. MATERIALS AND WORKMANSHIP
>
> Unless otherwise specifically provided for in the specifications, all equipment, materials, and articles in-

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2/ As a precautionary matter the United States has appealed from the dismissal of its third-party complaint. The purpose of that appeal is simply to preserve the Government's claim for indemnity against Merritt-Chapman & Scott in the event the judgment dismissing plaintiffs' complaint and action is set aside (TR 54, 65).

3/ It has been stipulated that Merritt-Chapman & Scott performed its work "in the capacity of an independent contractor" (TP 302).

4/ That exhibit was received in evidence and has been transmitted to this Court as a separate volume (TR 12, 32-35).

corporated in the work covered by this contract are to be new and of the most suitable grade of their respective kinds for the purpose and all workmanship shall be first class. * * *

9. INSPECTION

(a) * * * [A]ll material and workmanship, if not otherwise designated by the specifications, shall be subject to inspection, examination, and test by the Contracting Officer at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. * * *

* * * *

10. SUPERINTENDENCE BY CONTRACTOR

The Contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the Contracting Officer, on the work at all times during progress, with authority to act for him.

11. PERMITS AND RESPONSIBILITY FOR WORK, ETC.

* * * He [the Contractor] shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work. * * *

SPECIFICATIONS

GENERAL CONDITIONS

* * * *

10. Accident prevention. The contractor shall, at all times, exercise reasonable precautions for the safety of

> employees in the performance of this contract, and shall comply with all applicable provisions of Federal, State, and municipal safety laws and building and construction codes. The contractor shall also comply with the provisions of the Bureau of Reclamation publication "Safety Requirements for Construction by Contract," in effect on date bids are opened, so far as applicable, as determined by the contracting officer and unless such provisions are incompatible with Federal, State, or municipal laws or regulations. Monthly reports of all lost-time accidents shall be promptly submitted giving such data as may be prescribed by the contracting officer. Nothing in this paragraph shall be construed to permit the enforcement of any laws, codes, or regulations herein specified by any except the contracting officer.

* * * *

Plaintiffs, experienced ironworkers, were employed by Merritt-Chapman & Scott to perform construction work at the dam site in Page, Arizona (TP 276-277, 302, 408). On the day of the accident, April 15, 1964, plaintiffs were reassembling a large movable scaffold known as a "jumbo," which was then located in the dam's west diversion spillway tunnel, on an incline of 55 degrees and about 532 feet above the bed of the Colorado River (TR 2; TP 301, 306). At the time of the accident, 2:30 - 2:40 p.m., plaintiffs were standing on the jumbo's bottom platform, about 3-4 feet from its front edge (TP 47, 282-283, 285). Unlike the other levels of the jumbo, the platform on which plaintiffs were standing was not properly

equipped with handrails or toeboards,[5/] and it did not have front guardrails or a safety net (TR 53; TP 49, 58, 284-285, 301-302, 307-308, 416-417). (The reassembling work did not require the removal of any of those safety devices (TP 307-311, 356-359).) In addition, neither plaintiff was using a safety belt, although such belts were readily available for their use (TR 55; TP 62-63, 304-306, 425).

The accident occurred when plaintiff Roberson requested that the jumbo be moved up "just a little bit" to permit plaintiffs to continue reassembling the jumbo (TP 46, 286, 306). The jumbo moved up about 2-4 inches and then immediately slipped about 25 feet; plaintiffs fell from the platform on which they were standing (TP 48-49, 100-101, 286). Plaintiffs filed claims for workmen's compensation benefits with the Arizona Industrial Commission on account of personal injuries sustained in the accident (TR 33; TP 319).

The jumbo was operated through a cable connected with a hoist. The hoist was held in place by two other cables anchored to pins set in the tunnel's splitter wall. The slip of the jumbo was caused either by the improper setting or inadequate strength of one of the anchor pins (TR 53; TP 71-77, 183-186, 207-211, 246, 252-253, 367-370). There was no evidence that the quality or strength of the pin could be determined by

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5/ Toeboards would prevent a person from falling underneath the jumbo (TP 397).

visual inspection in place, and it was not possible to observe whether the pin had been installed properly when the cable from the hoist covered the anchor pin (TP 143-144, 390-391, 449).

The jumbo and anchor pin were the property of Merritt-Chapman & Scott (TR 53; TP 423). The jumbo was assembled in the west spillway tunnel during the middle of March 1964 under the direction of plaintiff Jack Roberson, who was assisted by three other Merritt-Chapman & Scott employees (TP 162-163, 409-412, 421). Concerning the installation, Roberson testified that, while he never received drawings illustrating how to rig the jumbo, he discussed the matter with Merritt-Chapman & Scott's superintendent (TP 421-422); that he alone selected the place where the holes for the anchor pins were to be drilled and determined the angles at which those holes were to be drilled (TP 422, 426-427); that the size of the hole was determined by a Merritt-Chapman & Scott employee (TP 414-415); that he (Roberson) ordered the pins placed in the holes (TP 427); that the hole involved in the accident appeared to be "bigger" than its pin (TP 431); that he did not rig the jumbo with cables around the front of the bottom deck (TP 430); but thatthe installation of the hoist appeared safe to him (TP 427); and that after the installation, he checked the anchor pin "to see how it was acting" (TP 428).

When the jumbo was assembled, it was used by Merritt-Chapman & Scott grouters to put grout into the tunnel's

concrete walls (TP 416). According to the testimony of one Ben W. Mullins, a Merritt-Chapman & Scott grout foreman, the jumbo had wooden handrails when it was first used around March 15, 1964, which handrails broke off the front of the jumbo prior to the accident on April 15, 1964 (TP 372-373). Mullins also asserted that there were toeboards on the jumbo's front end at the time of its installation but not at the time of the accident (TP 375).

2. The District Court's Decision.

The district court (per Judge Walter E. Craig) found that the failure of the pin and lack of adequate guardrails or other safety appliances on the jumbo resulted in the injuries sustained by the plaintiffs (TR 53). It concluded that the fact that the Government voluntarily maintained its own safety program during the construction of the dam did not abrogate Merritt-Chapman & Scott's contractual undertaking "to maintain its own safety program for the protection of its employees" (TR 53-54). The court concluded further that, while the Government had a contractual right to inspect the premises under construction to assure itself that Merritt-Chapman & Scott complied with the required safety measures of the contract, it did not have a duty to do so, and that because "there was no duty on the part of the . . . Government to the plaintiffs, there could be no breach of a duty, and thus no liability under the provisions of the

Federal Tort Claims Act" (TR 53-54). The court noted that were it to find it necessary to reach a determination as to plaintiffs' contributory negligence (TR 55):

> it would conclude that the evidence adduced at the trial disclosed that the plaintiffs, and each of them, were two experienced iron workers and were guilty of contributory negligence in working on the Jumbo, without the use of safety belts which were ready and available for their use, knowing that the Jumbo was to be moved.

Concerning the Government's third-party complaint and action against Merritt-Chapman & Scott, the court ruled that the contractor was not liable for indemnification under the contract for the reason that the Government was not liable to plaintiffs (TR 54).

ARGUMENT

SUMMARY

In Point I, infra, we show that plaintiffs have failed to prove a cause of action founded upon the Government's negligence. Plaintiffs urge that the Government owed them certain duties by reason of its retention of control of the work and its undertaking safety inspections and enforcement at the job site. These contentions are totally without merit. For the contract between the Government and Merritt-Chapman & Scott, plaintiffs' employer, did not retain in the Government any "control" of the work so as to create a duty of care on the part of the Government to plaintiffs. Kirk v. United States, 270 F. 2d 110 (C.A. 9);

Wallach v. United States, 291 F. 2d 69 (C.A. 2), certiorari dismissed, 368 U.S. 892, certiorari denied, 368 U.S. 935; Cannon v. United States, 328 F. 2d 763 (C.A. 7), certiorari denied, 379 U.S. 832; Buchanan v. United States, 305 F. 2d 738 (C.A. 8). In addition, the Government's maintenance of a safety program during construction did not of itself create a duty of care on its part to plaintiffs. Kirk v. United States, 270 F. 2d 110 (C.A. 9); Blaber v. United States, 332 F. 2d 629 (C.A. 2); Grogan v. United States, 341 F. 2d 39 (C.A. 6); United States v. Page, 350 F. 2d 28 (C.A. 10), certiorari denied, 382 U.S. 979. Finally, plaintiffs failed to prove that the Government in fact exercised control or that its safety program subjected them to any increased risks.

In Point II, infra, we show that, if the Government were liable for plaintiffs' injuries, Merritt-Chapman & Scott would be required, by reason of its contract with the Government, to indemnify it. First: We demonstrate that federal, not state law determines the rights and liabilities of the Government and Merritt-Chapman & Scott. Clearfield Trust Co. v. United States, 318 U.S. 363; United States v. Allegheny County, 332 U.S. 174; Woodbury v. United States, 313 F. 2d 291 (C.A. 9). Second: We establish that the allegations in the Government's third-party complaint, if proved, would entitle it to contractual indemnity from Merritt-Chapman & Scott. Globig v. Greene & Gust Co., 201 F. Supp. 945 (E.D. Wisc.), adopted and affirmed sub nom. Globig v. Burton Plumbing-Heating Co., 313 F. 2d 202 (C.A. 7); Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corp., 141 F. Supp. 833, 837-838

(N.D. Calif.); Porello v. United States, 94 F. Supp. 952 (S.D. N.Y.); Johnson v. United States, 133 F. Supp. 613 (E.D. N.C.). And third: We show that there is no merit to the contractor's contention that Arizona's Workmen's Compensation Act bars or limits the Government's claim for contractual indemnity.

I

THE GOVERNMENT DID NOT BREACH ANY DUTIES IT MAY HAVE OWED TO PLAINTIFFS

Under the Federal Tort Claims Act, the United States may be held liable for personal injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). The Act does not subject the United States to absolute liability without fault; rather, a negligent or wrongful act or omission of a Government employee is a necessary prerequisite for liability. See e.g., Dalehite v. United States, 346 U.S. 15, 44-45; Dushon v. United States, 243 F. 2d 451, 454 (C.A. 9), certiorari denied, 355 U.S. 933; United States v. Page, 350 F. 2d 28, 33-34 (C.A. 10), certiorari denied, 382 U.S. 979.

The accident here involved occurred in Arizona. And, according to that state's law, a cause of action founded upon negligence must be based upon a showing (1) that the defendant had a duty to protect the plaintiff from the injury of which he complains; (2) that the defendant failed to perform that duty; and (3) that such failure proximately caused the plaintiff's injury. Shafer v. Monte Mansfield Motors, 91 Ariz. 331, 333, 372 P. 2d 333 (S. Ct.).

On their appeal, plaintiffs Roberson and Rodgers contend that the Government is liable to them under Arizona's law of negligence, primarily on two grounds: First, they argue, the Government retained and exercised control of the work, including the safety work on the dam, and it is liable because of its failure to exercise that control with reasonable care (Roberson and Rodgers Brief, pp. 20, 27-28). Second, they argue, the Government is liable because it negligently performed its voluntary undertakings to inspect and correct the hazardous rigging of the jumbo, and to correct violations of applicable safety requirements (Id., pp. 43, 46-48, 56).

As we show below, these contentions are totally without merit. As the district court correctly held, the Government did not breach any duty it may have owed to plaintiffs.

A. Neither the Contract Between the Government and Merritt-Chapman & Scott Nor the Government Safety Program Created Any Duties On the Part of the Government to Plaintiffs.

As indicated above, plaintiffs urge that the Government owed them certain duties by reason of (1) its retention of control of the work and (2) its undertaking safety inspections and enforcement at the job site. That argument is based on erroneous premises. For the Government did not by contract retain control so as to subject it to liability to these plaintiffs. And the Government's safety program did not of itself impose upon the Government any additional obligations

to plaintiffs.

1. The Government did not by contract "retain control" of the work entrusted to its independent contractor. "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Restatement (Second), Torts § 414.[6/] In order for Section 414 to be applicable, however, "the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations." Id., Comment c. For "[s]uch a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail." Ibid.

The Government did not by contract "retain control" of the work entrusted to Merritt-Chapman & Scott, its independent contractor, and therefore owed no duties to its contractor's employees,

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6/ In the absence of prior decisions to the contrary, the Supreme Court of Arizona follows the application of the Restatement of the Law of Torts. MacNeil v. Perkins, 84 Ariz. 74, 81, 324 P. 2d 211 (S. Ct.).

including plaintiffs. Indeed, plaintiffs have not pointed and cannot point to a single contract provision reserving control to the Government. In fact, the standard contract here involved required the contractor to have a competent foreman or superintendent on the job at all times, with authority to act for it (General Provisions, 10). For under the contract, the contractor's representative, not the Government's, superintended the work on the dam.

Moreover, the fact that the contract gave the Government the right to inspect (General Provisions, 9) and the right to enforce compliance with applicable safety requirements (Specifications - General Conditions, 10) does not improve plaintiffs' position here. For it is well settled that such standard Government contract provisions do not constitute retention of control of the work so as to subject the United States to liability to workers on the job. Kirk v. United States, 270 F. 2d 110 (C.A. 9); Wallach v. United States, 291 F. 2d 69 (C.A. 2), certiorari dismissed, 368 U.S. 892, certiorari denied, 368 U.S. 935; Cannon v. United States, 328 F. 2d 763 (C.A. 7), certiorari denied, 379 U.S. 832;[7] Buchanan v. United States, 305 F. 2d 738 (C.A. 8).[8] As this Court stated in Kirk

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7/ Cannon overruled Schmid v. United States, 273 F. 2d 172 (C.A. 7), cited by plaintiffs on page 26 of their brief.

8/ United States v. Pierce, 235 F. 2d 466 (C.A. 6), cited and relied on by plaintiffs on pages 23-26 of their brief, is not in point since the contract there expressly reserved control of the operations.

(270 F. 2d at 117):

> * * * The fact that the United States retained the right to inspect the work under construction to see that the provisions of the contract were carried out and also retained the right to stop work if they were not is not sufficient in itself to make the United States liable for damages resulting from negligence of the contractors in their performance of the contract. Gallagher v. United States Lines Co., 2 Cir., 206 F. 2d 177; Alexander v. Frost Lumber Industries, D.C., 88 F. Supp. 516, affirmed 5 Cir., 187 F. 2d 27; McDonald v. Shell Oil Co., 44 Cal. 2d 785, 285 P. 2d 902.

In short, the fact that Government inspectors inspected the work at the dam site and sought compliance with safety requirements did not place the Government in control of the work.

2. By conducting a safety program, the Government did not "undertake" to assure the safety of its contractor's employees. Nowhere in the contract between the Government and Merritt-Chapman & Scott did the Government obligate itself to look out for the safety of its contractor's employees. In fact, the contract states that "[t]he contractor shall, at all times, exercise reasonable precautions for the safety of employees . . ." (Specifications - General Conditions, 10). Nevertheless, plaintiffs argue that, because of its safety activities at the dam site, the Government somehow undertook to prevent accidents such as the one here involved. That argument, too, lacks merit. It was considered and rejected by this Court in Kirk v. United States, 270 F. 2d

110 (C.A. 9), and has been rejected by other courts of appeals as well. Blaber v. United States, 332 F. 2d 629 (C.A. 2); Grogan v. United States, 341 F. 2d 39 (C.A. 6); United States v. Page, 350 F. 2d 28 (C.A. 10), certiorari denied, 382 U.S. 979. And see, Lipka v. United States, 369 F. 2d 288 (C.A. 2).

In Kirk, the decedent, an employee of independent contractors selected by the Government to do construction work at a dam in Idaho, fell from a scaffold into a river. The accident there occurred when the structure on which decedent was working collapsed due to the removal of some of the bolts holding it together. There were no safety nets under the scaffolding or other safety devices in or near the area where decedent fell into the river. Life preservers were available but had not been used, and decedent had failed to secure himself by attaching a rope to his safety belt. The Government there, as here, was represented on the construction project by inspectors whose duty it was to see that the contract provisions were complied with by the contractors, including the applicable safety provisions. The inspectors were unaware of the fact that the bolts had been removed.

In this Court, it was contended as plaintiffs urge here (270 F. 2d at 117):

> that the United States was under a legal duty to Kirk to inspect and test the scaffold and movable forms and to carry out a continuous and comprehensive accident prevention and rescue program for

> the protection not only of the employees of the United States but of the employees of the independent contractors. . . .

This Court rejected that contention, holding that there was no such legal duty, and expressed its agreement (270 F. 2d at 118) with the following statement which appeared in the memorandum decision of the trial court:

> The voluntary assumption of such a program [accident prevention and safety program] for the welfare of all parties concerned should not create liability on the part of the defendant to the employees of contractors where the performance, or failure to perform, in no wise increases the hazard to the employees of the contractor beyond that which would otherwise have been present. Every Government employee must trace the duties of his job to some law, regulation, or order, but this does not mean that in every such case there is thereby established a duty of care on the part of the employee and the Government toward those who may be incidentally benefited if those duties are properly performed, or toward those who may be incidentally injured if those duties are not properly performed. 9/

9/ On pages 48-52 of their brief here, plaintiffs assert that the Government owed them certain non-delegable duties. That assertion is incorrect. First, under Arizona law, such non-delegable duties are not owed by an employer of an independent contractor to the contractor's employees. Welker v. Kennecott Copper Company, 1 Ariz. App. 395, 403 P. 2d 330 (C.A.). Second, the Federal Tort Claims Act does not subject the Government to vicarious liability for its independent contractor's negligent acts. Strangi v. United States, 211 F. 2d 305 (C.A. 5); Dushon v. United States, 243 F. 2d 451, 454 (C.A. 9), certiorari denied, 355 U.S. 933; United States v. Page, supra, 350 F. 2d at 33-34.

B. The Government Did Not in Fact Exercise "Control" Over the Work Or Subject Plaintiffs to Increased Hazards.

As we have shown above, neither the contract between the Government and Merritt-Chapman & Scott nor the Government safety program created any duties on the part of the Government to plaintiffs. We now show that the Government did not in fact exercise control over the work or by its safety program in fact subject plaintiffs to increased hazards--i.e., that the Government did not owe plaintiffs any duty on account of its conduct.

1. There is absolutely no evidence that Bureau of Reclamation personnel exercised control of any aspect of Merritt-Chapman & Scott's safety program. As the testimony of Reuben C. Gaulke, the Bureau's Safety and Management Officer at the dam site, demonstrates the purpose of the Bureau's safety program was to seek Merritt-Chapman & Scott's compliance with its safety requirements, not to assume responsibility for the contractor's operations (TP 109, 111, 137-138). Thus, Gaulke's assistant, one Dick Blake, gave him daily safety inspection reports and called violations of the Bureau's safety regulations to Merritt-Chapman & Scott's attention to enable it to take corrective actions (TP 119, 121-123, 404). For the Bureau's safety inspectors could not order Merritt-Chapman & Scott's employees to stop work and take corrective actions except in emergency situations (TP 144-145, 147-149). Moreover, those inspectors were not expert technicians--they did not possess sufficient knowledge to determine the tensile

strength of the anchor pin here involved (TP 142-143).

Gaulke's testimony was confirmed by several of plaintiffs' witnesses. For example, one Mark Weaver, a general foreman for Merritt-Chapman & Scott's ironworkers, acknowledged that the Bureau's inspectors did not themselves correct unsafe conditions or order the contractor's employees to do so; rather, corrections were made by the contractor's employees on the basis of written orders from the contractor concerning safety practices (TP 6-8, 15, 25-30). Indeed, only readily observable unsafe conditions were called to his (Weaver's) attention by Blake (TP 19). In addition, plaintiff William Rodgers admitted that he did not receive any instructions concerning safety from Bureau personnel and did not see or even know of any Bureau safety inspectors on the job (TP 282, 311-313).[10/]

There is likewise no evidence of an act or omission of any Bureau employee which subjected plaintiffs to increased hazards beyond those which would otherwise have been present. Cf. Kirk v. United States, supra, 270 F. 2d at 118. Bureau personnel did not permit the Bureau's safety program to displace Merritt-

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10/ One Ben W. Mullins, a Merritt-Chapman & Scott grout foreman, and plaintiff Jack Roberson testified that prior to the accident Bureau work or grouting, not safety, inspectors occasionally instructed them to replace and/or repair sections of the jumbo's handrail (TP 362-363, 366, 377, 379, 384-387, 417-418). However, that testimony may not have been believed by the trial court, and in any event, hardly establishes Bureau control of safety on the jumbo.

Chapman & Scott's. Indeed, the testimony of plaintiffs' own witnesses disclosed that the contractor had been conducting an active safety program as was required of it under the contract: It had a weekly safety check of the jumbos (TP 10); held weekly safety meetings which were attended by plaintiff Jack Roberson as the foreman of his crew (TP 388, 424); made safety manuals accessible to its ironworkers (TP 16); and furnished safety devices, including safety belts, for work on the dam (TP 16).[11/]

2. From the above, it is apparent that the Government neither assumed a duty to protect these plaintiffs from the injuries of which they complain, nor subjected them to increased hazards. The district court's failure to find liability on the part of the Government was not, as plaintiffs in effect argue, clearly erroneous. Rule 52(a), Fed.R.Civ.P. For plaintiffs' employer, not the Government, "had the primary responsibility for the safety of its employees; it had the direct control and supervision over them." United States v. Page, supra, 350 F. 2d at 31. It had the duty to install, inspect, maintain and operate the jumbo from which plaintiffs fell. While Bureau inspectors may have made periodic inspections to see that safety regulations were complied with, "[t]he fact of inspections alone does not

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11/ Plaintiffs' assertion that "when the jumbo slipped just seven days prior to appellants' severe accident, the Government [became] totally aware of this hazardous condition" (Brief, p. 49), is not well-taken. The April 8, 1964 slipping incident "had nothing to do with the accident of the 15th of April" (TP 43-44, 55, 129).

establish the extent of the inspector's obligation." Blaber v. United States, supra, 332 F. 2d at 632.

For the foregoing reasons, we believe that the district court held correctly that the Government owed no duty to plaintiffs. However, even if the Government somehow breached a duty it owed to plaintiffs, their recovery here is barred by their own contributory negligence. Plaintiffs were experienced ironworkers (TP 276-277, 302-408). Yet, as the district court found, they stood on the jumbo platform without using readily available safety belts when they knew that the jumbo was about to be moved (TR 55; TP 16, 46-47, 62-63, 282-286, 304-306, 425). Indeed, plaintiff Jack Roberson admitted that he had used safety belts on other occasions while working in high places (TP 425).

Plaintiffs' assertion that safety belts could not be used here (Roberson and Rodgers Brief, p. 54), is refuted by Roberson's own testimony on direct examination (TP 416-417) and that of Mullins as well (TP 373-374, 395-397); plaintiffs could have attached belts to the cable or guardrails around the back of the platform on which they were then standing. And, plaintiffs' contention that Arizona's Employers Liability Law [12/]

12/ Ariz. Rev. Stat. Ann., § 23-801, et seq.

applies here (Id., p. 55), is wholly misplaced. For that law subjects the employer of an injured worker, not the employer of an independent contractor, to liability; it has no application here since plaintiffs were not employed by the Government.

II

THE GOVERNMENT'S THIRD-PARTY COMPLAINT STATED A CLAIM FOR CONTRACTUAL INDEMNITY UPON WHICH RELIEF COULD BE GRANTED

For the reasons stated in Point I, supra, this Court should affirm the district court's dismissal of plaintiffs' action against the United States. If it does so, it need not consider, of course, any of the questions involving the Government's claim for contractual indemnity from Merritt-Chapman & Scott. In this Point, however, we discuss what action the court should take respecting the other two appeals should it disagree with our position and set aside the judgment against the plaintiffs.

Merritt-Chapman & Scott has attempted to appeal from the failure of the district court to hold that it could not be liable to the Government for any portion of any judgment in favor of plaintiffs and against the Government, and the court's order granting the Government's motion to strike its affirmative defenses (TR 66). It is clear, however, that this Court lacks jurisdiction of that appeal--No. 20,834 here--for the reason that it is not from a "final" decision of the court below. 28 U.S.C. 1291. For the district court's final judgment only (1) dismissed

plaintiffs' complaint and action on the merits, and (2) dismissed the Government's third-party complaint and action against Merritt-Chapman & Scott (TR 57). The district court did not enter a final judgment adverse to Merritt-Chapman & Scott so as to permit it to appeal to this Court. Accordingly, Merritt-Chapman & Scott's appeal--No. 20,834--should be dismissed.

As a precautionary matter, however, the United States has appealed to this Court from the district court's dismissal of its third-party complaint and action (TR 65). The purpose of that appeal--No. 20,833 here--is simply to preserve the Government's claim for indemnity against Merritt-Chapman & Scott in the event the judgment dismissing plaintiffs' complaint and action is set aside. Since the contentions which Merritt-Chapman & Scott makes in its brief as appellant in No. 20,834 would--if meritorious--defea the Government's claim for indemnity, we think that they can be considered as being advanced as an alternative basis for affirmance of the dismissal of the third-party complaint.[13/] Accordingly, we now will address ourselves to those contentions and show that, in granting the Government's motion to strike that portion of Merritt-Chapman & Scott's answer to its third-party complaint

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13/ The district court's dismissal of the third-party complaint was, of course, based solely on its dismissal of plaintiffs' complaint.

designated as "ADDITIONAL DEFENSES" (TR 18-22, 74), the district court correctly ruled in effect that that complaint stated a claim for contractual indemnity upon which relief could be granted.

A. Federal Law Determines the Rights and Liabilities of Parties to a Standard Government Contract.

Merritt-Chapman & Scott here assumes that Arizona law determines the rights and liabilities created by the standard contract between itself and the Government (Brief, pp. 14-17). That assumption is without merit. It is settled that federal, not state law determines the rights and liabilities of the parties to a standard Government construction contract such as the one here involved. Clearfield Trust Co. v. United States, 318 U.S. 363; United States v. Allegheny County, 332 U.S. 174.

In Allegheny County, for example, the Supreme Court had to decide whether title to property which was the subject of a contract between the United States and a contractor was to be determined according to state or federal law. The Court applied federal law and stated (322 U.S. at 183):

> The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state. * * *

Similarly, in Woodbury v. United States, 313 F. 2d 291 (C.A. 9), this Court noted that "the law to be applied in

construing or applying provisions of government contracts is federal, not state law." 313 F. 2d at 295. And, with specific reference to an indemnity agreement in a Government lease, the Court of Appeals for the Seventh Circuit ruled unequivocally that federal law determined the validity and scope of the indemnity provision. United States v. Starks, 239 F. 2d 544 (C.A. 7).[14/]

B. The Allegations in the Government's Third-Party Complaint Entitle It to Relief Under Federal Law in Contractual Indemnity.

The Government's third-party complaint alleged that plaintiffs' injuries were caused or contributed to by Merritt-Chapman & Scott's fault, negligence or breach of contract in that it failed: to instruct plaintiffs properly and adequately as to the safe and prudent manner of performing their work; to supervise them properly and adequately; to provide and maintain an adequate, proper and safe place to work; to provide plaintiffs with properly constructed equipment to perform the work assigned to them; to inform plaintiffs adequately of any dangerous or hazardous conditions likely to injure them; and to perform its

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14/ In fact, the Government probably stated a claim for contractual indemnity under Arizona law as well as under federal law. See, First National Bank of Arizona v. Otis Elevator Co., 2 Ariz. App. 80, 406 P. 2d 430 (C.A.), rehearing denied, 2 Ariz. App. 596, 411 P. 2d 34; Graver Tank & Manufacturing Company v. The Fluor Corporation Ltd., _____ Ariz. App. _____, 421 P. 2d 909, 911-912 (C.A.).

work in a proper and careful manner (TR 14-15). Those allegations, if proved, would entitle the Government to relief under federal law in contractual indemnity on three separate and distinct bases.

1. The first count of the Government's third-party complaint sought full indemnification on the basis of the contractor's express undertaking to (TR 14-15):

> be responsible for all damages to persons or property that occur as a result of [its] fault or negligence in connection with the prosecution of the work.

Merritt-Chapman & Scott contends in effect that this provision does not require it to indemnify the Government where damages result from its and the Government's negligence (Brief, pp. 24-28). However, negligence on the part of the indemnitee does not bar an action for contractual indemnity. Weyerhaeuser S.S. Co. v. Nacirema Co., 355 U.S. 563. And, at least three courts have held that indemnity may be had under the provision here involved even if the Government also was negligent. Globig v. Greene & Gust Co., 201 F. Supp. 945 (E.D. Wisc.), adopted and affirmed sub nom. Globig v. Burton Plumbing-Heating Co., 313 F. 2d 202 (C.A. 7); Porello v. United States, 94 F. Supp. 952 (S.D. N.Y.); Johnson v. United States, 133 F. Supp. 613 (E.D. N.C.).

In Globig, the plaintiff, an employee of a Government sub-sub-contractor, commenced a diversity action against Greene & Gust Co., the Government's prime contractor, and Burton Plumbing-Heating Co., a sub-contractor, for personal injuries sustained

in a fall in a housing unit which was owned by the Government and being remodeled by Greene and Gust Co. Burton then filed a third-party complaint for contribution against the Government under the Federal Tort Claims Act, and the Government cross-claimed against its prime contractor for indemnification. The district court found the defendants and the Government negligent. In particular, it found that the Government as owner of the place of employment failed to turn it over to the contractors in safe condition and failed to detect that the unsafe condition which occasioned plaintiff's fall had not been corrected by its contractor. The court therefore allowed the claim for contribution from the Government as a joint-tortfeasor. However, the court also granted the Government's cross-claim for indemnity for the reason, among others, that the contract there involved, like the contract here, required the contractor to be responsible "for all damages to persons that occur through his fault or negligence in connection with the prosecution of the work." 201 F. Supp. at 951-952. The court held that the Government's negligence was not a defense against its express contractual claim for indemnification. 201 F. Supp. at 953.

Here, Merritt-Chapman & Scott, not the Government, assumed by express agreement primary responsibility for the safety of plaintiffs in their work. It is hardly unfair to require it to indemnify the Government for losses it may sustain on account of Merritt-Chapman & Scott's failure to fulfill its primary

responsibilities.[15/]

In short, as the district court recognized, the indemnity provision in the contract here involved gave the Government express protection against losses caused by Merritt-Chapman & Scott's negligence or fault. Should it become necessary for the Government to prove the allegations of its third-party complaint, which sets forth the acts and omissions of Merritt-Chapman & Scott that would warrant a recovery, it will, if it proves them, be entitled to indemnity from that contractor.

2. The second count of the Government's third-party complaint sought full indemnification on the basis of Merritt-Chapman & Scott's breach of its express contractual obligations: (a) to perform the work in strict accordance with the contract's general provisions, specifications, schedules, drawings, and conditions; (b) to comply with applicable safety requirements; (c) to provide new and suitable equipment, materials and articles for incorporation in the work and "first class" workmanship; and (d) to have a competent foreman or superintendent on the work at all times (TR 15-16). It is manifest that any recovery here by plaintiffs against the Government might well

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15/ Merritt-Chapman & Scott's liability to the Government extends beyond damages incurred on account of its (Merritt-Chapman & Scott's) negligence. For it assumed responsibility for damages resulting also from its "fault," which means "any breach of warranty or obligation." Compania Transatlantia Espanola, S.A. v. Melendez Torres, 358 F. 2d 209, 213 (C.A. 1).

be a reasonably foreseeable consequence of Merritt-Chapman & Scott's breach of any one of those obligations. Thus, if the Government were liable for plaintiffs' personal injuries, it would be entitled to contract damages--indemnification--from Merritt-Chapman & Scott. Accord: Choate v. United States, 233 F. Supp. 463 (W.D. Okla.).

3. The third and final count of the third-party complaint set forth a claim for indemnification on the basis of Merritt-Chapman & Scott's breach of its contractual duties to perform the work properly and safely and to provide workmanlike service in its performance (TR 16-17). That count, too, stated a good cause of action.

It is now well established that contracts for the performance of services carry with them the implied undertaking that the promisor will execute his tasks with due care. Ryan Co. v. Pan-Atlantic Corp., 350 U.S. 124; Weyerhaeuser S.S. Co. v. Nacirema, supra. In other words, the obligor warrants the skill of his trade. Thus in Ryan, the Supreme Court held that breach of the promisor's warranty of safe performance entitled the promisee to recover an indemnity even in the absence of an express indemnity provision in the contract. In addition, under the principle of implied indemnity, negligence on the part of the indemnitee will not, as a matter of law, bar recovery. Weyerhaeuse S.S. Co. v. Nacirema, supra, 355 U.S. at 568-569; Italia Societa

Per Azioni Di Navigazione v. Oregon Stevedoring Co., 375 U.S. 315, 319-320.

These principles have been held applicable in non-maritime situations and apply here. Globig v. Greene & Gust Co., supra, 201 F. Supp. at 951-953; Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corp., 141 F. Supp. 833, 837-838 (N.D. Calif.). Accord: General Electric Co. v. Moretz, 270 F. 2d 780 (C.A. 4), rehearing denied, 272 F. 2d 624, certiorari denied sub nom. The Mason & Dixon Lines, Inc. v. General Electric Co., 361 U.S. 964. For there is no distinction between the contractual obligations under the relevant stevedoring contracts, and the contract here involved.

Here, it is not necessary to imply a warranty of safe performance; it is expressly made by contract. For, as indicated above (pp. 3-5), Merritt-Chapman & Scott expressly undertook to "exercise reasonable precautions for the safety of employees in the performance of [the] contract;" to comply with applicable safety requirements; and to provide "first class" workmanship.16/

In these circumstances, the Government's third-party complaint, in setting forth allegations of Merritt-Chapman & Scott's breach of contractual responsibilities with respect to safety precautions and the supervision of plaintiffs, stated a cause of action entitling it to recover an implied

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16/ In Weyerhaeuser S.S. Co. v. Nacirema Co., supra, the Supreme Court reaffirmed its interpretation of similar language in the Ryan contract and the contract there involved, as constituting "a contractual undertaking to [perform] 'with reasonable safety'" and to discharge "foreseeable damage resulting to the shipowner [contractee] from the contractor's improper performance." 355 U.S. at 565.

contractual indemnity for any sums it might have to pay plaintiffs on account of Merritt-Chapman & Scott's negligence and breach of duty.

C. Arizona's Workmen's Compensation Act Can Neither Bar Nor Limit the Government's Claim For Contractual Indemnity.

Finally, there is no merit to Merritt-Chapman & Scott's contention that Arizona's Workmen's Compensation Act, Ariz. Rev. Stat. Ann., § 23-901, et seq., somehow bars or limits its contractual liability to the Government (Brief, pp. 19-24, 35-36).

First: Under federal common law principles, the contractual obligations of a contractor to indemnify his principal where the contractor's negligence or fault causes him to sustain loss, are independent of any limitation on liability existing between the contractor and his injured employee who is covered by workmen's compensation insurance. This is the manifest import of Ryan, and the holding in that case has been reaffirmed numerous times. Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, 602-603. Thus, it is no defense to the Government's claim for contractual indemnity that Merritt-Chapman & Scott is not liable in tort to plaintiffs by reason of Arizona's Workmen's Compensation Act. For the contractual obligations here involved run from Merritt-Chapman & Scott to the Government; they cannot be defeated or limited by a defense of workmen's compensation which Merritt-

Chapman & Scott might assert against the plaintiffs under Arizona law.

Second: Employers who comply with the provisions of Arizona's Workmen's Compensation Act as to securing compensation, "shall not be liable for damages at common law or by statute . . . for injury or death of an employee wherever occurring, but it shall be optional with employees to accept compensation . . . or to reject the provisions of this chapter and retain the right to sue the employer as provided by law." Ariz. Rev. Stat. Ann., § 23-906. While there do not appear to be any Arizona decisions on the question whether the language grants the employer immunity for all causes of action growing out of an accident, regardless of the question of independent breach of duty, a majority of courts have held that similar language does not grant the employer any such immunity. See, 2 Larson's Workmen's Compensation Law (1961 ed.), § 76.30 and cases there cited. For as indicated by the above-quoted language in Arizona's Act, the immunity conferred is only as against actions for damages on account of the employee's injury. Here, the Government's action for indemnity is based on independent contractual duties owed by Merritt-Chapman & Scott to it. Thus, Arizona's Compensation Act would not operate as a bar or limit here.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court should be affirmed. However, in the event the dismissal of plaintiffs' complaint and action is set aside, the dismissal of the United States' third-party complaint and action should likewise be set aside and the entire case remanded for further proceedings. In all events, the appeal in No. 20,834 should be dismissed for lack of jurisdiction.

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Howard J. Kashner
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